Supreme Court, U.S.
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# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CARL BURPO,
*Petitioner,*

v.

THE PEOPLE OF THE STATE OF ILLINOIS
*Respondent.*

Petition for Writ of Certiorari to the
Supreme Court of Illinois

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I. WHETHER THE ILLINOIS CRIMINAL ASSAULT PROVISION, 720 ILCS 5/12-13 AND ITS EXEMPTION FOR MEDICAL EXAMINATIONS, 720 ILCS 5/12-18(b), IS VOID FOR VAGUENESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

## LIST OF ALL PARTIES TO THE PROCEEDING

1. State of Illinois
2. Carl Burpo
3. No corporation is involved.

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### OPINION BELOW

The February 17, 1995 Opinion of the Illinois Supreme Court, whose judgement is herein sought to be reviewed, is reported as Case No.76424, and is reprinted in the Appendix to this Petition.

### JURISDICTION

On February 17, 1995, the Illinois Supreme Court rendered its order and judgment reversing and remanding the decision of the trial court declaring the Illinois sexual assault statute, 720 ILCS 5/12-13, and its exemption for medical personnel, 720 ILCS 5/12-18(b), void-for-vagueness in violation of the fifth and fourteenth amendments of the United States Constitution.

On March 8, 1995, Petitioner timely filed a Petition for Rehearing which was denied by the Illinois Supreme Court on *April 3, 1995.*

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATUTE INVOLVED

720 ILCS 5/12-13 & 720 ILCS 5/12-18 are set forth within the Appendix.

## STATEMENT OF THE CASE

### NATURE OF THE CASE:

This is a prosecution of a 72 year old gynecologist on 21 counts of Criminal Sexual Abuse and Criminal Sexual Assault charges. The charges arise out of patient complaints over the manner in which the defendant manipulated their breasts and vagina during breast and pelvic examinations.

The defendant, Dr. Burpo, appeals from an order of the Illinois Supreme Court below re-instating eight counts of the 21 count indictment.

### COURSE OF THE PROCEEDINGS:

On April 3, 1992, Defendant, Carl Burpo, was charged in a 21-count Indictment with multiple violations of criminal sexual assault (720 ILCS 5/12-13(a)(2)), criminal sexual abuse (720 ILCS 5/12-15(a)(2)), and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(ii)). Counts 1, 5, 8, 11, 13, 15, 17 and 19 charged Defendant with criminal sexual assault.

On September 14, 1993, the St. Clair County Circuit Court in Belleville, Illinois dismissed the criminal sexual assault charges (Counts 1, 5, 8, 11, 13, 15, 17 and 19 of the Indictment) holding the Illinois criminal sexual assault statute, 720 ILCS 5/12-13, and its exemption for medical personnel, 720 ILCS 5/12-18(b)

unconstitutional under the fifth and fourteenth amendments of the U.S. Constitution.

On February 17, 1995, the Illinois Supreme Court reversed and remanded.

On April 3, 1995, the Illinois Supreme Court denied Petitioner's Petition for Rehearing.

## STATEMENT OF FACTS

Carl Burpo is an aging physician, who has practiced medicine in the Belleville area for over 40 years. At age 71, he was indicted for using breast and pelvic gynecological examinations as vehicles to sexually assault female patients. Eight counts of a 21 count indictment, charging the doctor with criminal sexual assault, form the subject of this appeal. (C.1-21).

The State concedes that the vaginal penetration alleged in the indictment was initiated as part of a legitimate examination. (C.307). The gist of the prosecution rests in the theory that the consent to the vaginal penetration which was given in each case, was vitiated at the point that Dr. Burpo's conduct strayed, in varying degrees, from a reasonable medical examination. (C.315).

The genesis of these charges was a February 25, 1991, gynecological examination of a 16 year old girl at a Planned Parenthood facility in Fairview Heights, Illinois. Her complaint against Dr. Burpo, as conveyed to the St. Clair County Grand Jury on February 7, 1992, was that during the manual portion of the examination, while the doctor's hand penetrated her vagina.

> ". . . he touched my clitoris . . . and I kind of jumped . . . and he said, I'm sorry. I didn't mean to startle you. And then he had taken his finger kind of moved around and out, and then he was up inside me and said, here's you ovaries, can you feel my finger twitching." (Transcript of Grand Jury Testimony, February 7, 1992, at 19).

She acknowledged that the doctor touched the clitoris only the one time mentioned and that his twitching while the examination took place was strange. (Transcript of Grand Jury Testimony, February 7, 1992, at 22).

There were other aspects of the exam that were elicited that allude to the possibility of a sexual motivation in the conduct of the examination. Dr. Burpo had her stand in front of him as he sat on a stool, had her turn and cough and she was unclothed at the time. During this process, she conveyed that,

> ". . . I bumped into him with my breast.
>
> Q. And where did you hit him?
>
> A. I think in the face, I'm not for sure though." (Transcript of Grand Jury Testimony, February 7, 1992, at 19-20).

The prosecutor determined that she had been given prior breast and pelvic examinations by other physicians, and inquired:

> "Was there anything different about what he did than any other doctors?
>
> A. Well, my other doctor, Dr. Smith, he always did it real fast . . . But he (Burpo) was slower with it and . . . took more time." (Transcript of Grand Jury Testimony, February 7, 1992, at 20).

Finally, she recounted the doctor's post examination discussion in his office. He explained the birth control medication and concluded the discussion by touching her clothed breast. He had earlier found cysts in the breasts and as he touched it he assured her that the cysts were nothing to be concerned over. (Transcript of Grand Jury Testimony, February 7, 1992, at 21).

These facts were relayed to her mother, then conveyed to a caseworker, and ultimately formed the basis of a DCFS child

abuse investigation. (Transcript of Grand Jury Testimony, February 7, 1992, at 21). The subsequent investigation became a matter of public attention when the media and press chronicled the efforts of Planned Parenthood to thwart subpoenas for child patient lists. Several women, none of whom has spontaneously reported problems with Dr. Burpo, contacted authorities after observing media reports of the controversial investigation. All complaints dealt with varying aspects of the way he conducted breast and pelvic examinations. The pattern involved lack of concern over privacy and exposure of the body, the length of the examinations, the manner in which he manipulated the breasts during examination, and touching of the clitoris during the vaginal examination. (C.1-21).

Count 13 of the indictment, one of the eight counts of criminal sexual assault which were dismissed, involves a gynecological examination of Maureen Colton, who saw Dr. Burpo three months prior to the February 25, 1991 examinations of the young girl whose complaints originated the inquiry. (C.13).

Ms. Colton chronicled her complaints about Dr. Burpo's vaginal examination to a St. Clair County Grand Jury on December 20, 1991. She indicated that she had never experienced examination of the labia on any prior gynecological vaginal exam. (Transcript of Grand Jury Testimony, December 20, 1991, at 21). In explaining the commencement of the exam, she recalled that Dr. Burpo put a rubber tip on his finger, inserted the finger into her vagina, and commenced the pelvic exam. (Transcript of Grand Jury Testimony, December 20, 1991, at 19). The prosecutor then asked:

> "Q. Nothing out of the ordinary at this time?
>
> A. The rubber tip was out of the ordinary. Every gynecologist I've ever been to always wore rubber gloves." (Transcript of Grand Jury Testimony, December 20, 1991, at 19).

Ms. Colton then relayed her chief complaint:

> ". . . when he was going over the outside of my vagina, when he got to the clitoris, he was kind of tweaking at it and asking me if I had any problems there, and I tensed up and closed my legs and said no." (Transcript of Grand Jury Testimony, December 20, 1991, at 20)

The incident ended with her response and she noticed no change in the doctor's demeanor. (Transcript of Grand Jury Testimony, December 20, 1991, at 21).

The State produced a gynecologist to testify before the Grand Jury, presumably to give context to Dr. Burpo's actions during examinations. Dr. Carol Williams, a gynecologist from Cardinal Glennon Hospital was called before the Grand Jury on February 28, 1992. In describing the "standard" vaginal examination she indicated that it begins with inspection of the external genitalia or labia. If there is any enlargement of the clitoris the clitoris the examination may include some touching of the clitoris, to determine the nature of the enlargement. (Transcript of Grand Jury Testimony, February 28, 1992, at 6).

The prosecutor elicited numerous opinions concerning standard procedures in vaginal examinations. On several occasions, he framed inquiries in terms of reasonable medical standards.

Dr. Williams rendered the following opinions which tracked the testimony of female patients claiming to have been sexually assaulted during the vaginal examination:

> 1. The standard vaginal examination should take 3 minutes. (Transcript of Grand Jury Testimony, February 28, 1992, at 10).
>
> 2. The lips of the labia are pressed between the fingers to feel for lumps rather than rubbed. (Transcript of Grand Jury Testimony, February 28, 1992, at 6, 7).

3. The use of rubber tips is not standard practice. Rubber gloves are standard. (Transcript of Grand Jury Testimony, February 28, 1992, at 15).

4. It is not within medical standards to ask questions about sexual activity at a standard annual examination. (Transcript of Grand Jury Testimony, February 28, 1992, at 10, 11).

5. It is not appropriate to do a standing hernia examination unless attention is paid to keeping the upper part of the body draped. (Transcript of Grand Jury Testimony, February 28, 1992, at 17).

6. It is recommended medical standard that someone be in the room with the examining physician during examination. (Transcript of Grand Jury Testimony, February 28, 1992, at 17).

7. Failure to protect the privacy of the patient and doing anything in any way to suggest there be a sexual relationship is inconsistent with medical standards. (Transcript of Grand Jury Testimony, February 28, 1992, at 18).

On July 9, 1993, a hearing was held on defendant Carl Burpo's motion to declare 12-13 and 12-18(b) unconstitutional. (C.-284). The State agreed that each of the alleged victims consented to vaginal penetration as a part of the gynecological examination. The alleged victims did not however consent to acts that were not reasonable procedures for that examination. (C.315-316).

The defendant called Dr. Michael Gast, professor of gynecological medicine at Washington University School of Medicine, practicing gynecology and obstetrics at Barnes and Jewish Hospitals in St. Louis, Missouri. (C.284-285). Dr. Gast explained his standard pelvic examination, noting, "I customarily . . . teach my students and residents to perform examinations by

initially placing a hand on the patients's inner thigh or buttock on one side to kind of warn them that examination is about to begin . . . ." (C.288). In explaining the process, Dr. Gast testified:

> ". . . [I]t's appropriate to palpate the edges of the vagina, the areas of the vulva and so on between the thumb and fingers to evaluate the patient for masses or other kinds of lesions, cancers and things like that." (C.289).

Dr. Gast described a two finger insertion into the vagina and the use of both hands in palpating internal structures. (C.290). He noted:

> "Penetration of the vagina, both speculum examination and the bimanual examination, the two-handed examinations, involve insertion of something into the patient's vagina." (C.290).

Dr. Gast related that students are taught that the critical portion of the examination is the hand in the vagina and that you absolutely cannot keep your hand static during a vaginal examination. (C.291). The vaginal examination can involve manual exploration of the vulva, the clitoris, or the rectum, in addition to the internal vaginal structures. (C.291).

Dr. Gast lends his expertise on occasion in civil litigation where standard of care in given incident is at issue. He testified in such regard that:

> ". . . different docs in different places practice medicine in different ways, and so something that might be part of the normal course of medical care in Belleville wouldn't be part of a course of normal medical care in Hillsboro, and it might be different yet in Cairo . . . . [T]here's considerable variation in standards of care. It's difficult to define them sometimes because of differences in different localities." (C.293-294).

Dr. Gast was submitted the following question and gave the following response, having had experience in rendering expert opinions in malpractice cases throughout the State of Illinois:

> "Q. . . . in terms of reasonable medical standards, would you judge a gynecologist in terms of reasonable medical standards differently in Chicago than you would in Hillsboro, Illinois?
>
> A. Yeah, Certainly, depending on the case and the specific issues the answer is unquestionably yes." (C.294).

Dr. Gast proceeded to give specific examples within a broad range of potential physician conduct that could implicate responsibility for not performing a vaginal examination in a manner consistent with reasonable medical standards. (C.294-296).

## DECISION OF THE TRIAL COURT

On September 14, 1993, the Circuit Court, the Honorable James Radcliffe presiding, dismissed Counts 1, 5, 8, 11, 13, 15, 17, and 19 of the Indictment, holding that:

> "The evidence is unrebutted that a gynelogical examination is a proprioceptive evaluation requiring intrusion of the patient constituting "sexual penetration" as defined in 720 ILCS 5/12-12. "Sexual penetration" is the conduct proscribed in 720 ILCS 5/12-13. The statute does not further qualify the proscribed conduct with a specified mental state.
>
> That State concedes that the alleged victims consented to the gynecological exams. The State theorizes that this consent was vitiated when the defendant's actions became "inconsistent with reasonable medical standards."
>
> . . . [The] phrase "consistent with reasonable medical standards", is unconstitutionally vague and overbroad . . . . This record is replete with criminally benign conduct which

is inconsistent with "reasonable medical standards. . . . [T]he phrase is the hears of the statutory scheme as applied to gynecologists and this particular defendant. any deviation from "reasonable medical standards" defeats the exemption and vitiates consent. Due process does not abide a statutory scheme so vague and overbroad in nature that it's consequence is to expose a physician who performs a gynecological exam negligently to liability for a Class I Felony. (C.414).

THE ILLINOIS SUPREME COURT

On February 17, 1995, the Illinois Supreme Court reversed and remanded in an opinion by Justice Heiple. Justice Freeman wrote a separate Concurring Opinion, and Judge Harrison wrote in Dissent.

**MAJORITY OPINION**

After ruling against the State in determining that Dr. Burpo had standing to raise the constitutional issues, the majority turned to the question of whether sections 5/12-23 and 5/12-18(b) were, as Defendant challenged, void-for-vagueness:

"The defendant's construction of the statute is flawed. Under the statute, the prosecution must prove not only the act of sexual penetration but also that the defendant knew that the patient did not consent. The State contends, and we agree, that there is substantial interplay between the two sections. Specifically, subsumed within the sexual assault statute is the premise that the patient would only consent to an examination which was conducted pursuant to reasonable medical standards. When a gynecologist intentionally exceeds the scope of reasonable medical standards, the patient's consent is vitiated, and the physician may be prosecuted under the sexual assault statute. Therefore, the burden is on the State to establish beyond a reasonable

doubt what the reasonable medical standards were, that the physician intentionally transgressed those standards, and that the patient did not consent to the transgressions." *(Burpo, p. 2)*

"The defendant's assertion that mere negligence can subject a gynecologist to prosection for criminal sexual assault is baseless. The physician's good faith will protect him from criminal sanctions.

Thus, gynecologists are not implicated under the sexual assault statute simply because they perform invasive physical examinations. The State bears the burden of proof, and the defendant my attempt to avail himself of the exception by either rebutting the State's evidence regarding reasonable medical standards, rebutting the State's evidence concerning his mental state, or rebutting the State's evidence concerning the patient's consent." *(Burpo, p. 2)*

Upon determining that 720 ILCS 5/12-13 contained a scienter requirement (i.e. specific intent to exceed reasonable medical standards), the Majority rejected Defendant's contention that the "reasonable medical standards" languages implicated by the sexual assault statute is unconstitutionally vague:

"...due process requires that a statute must not be so vague that men of common intelligence must necessarily guess at its application or meaning. (*People v. Fabing* (1991), 143 Ill. 2d 48, 53.) Applying these principles to the present case, we find that the statute is sufficiently clear." *(Burpo, p. 3)*

"Criminal acts cannot always be defined with absolute precision. Laws criminalizing obscenity, for instance, are framed in general terms. However, they have withstood constitutional scrutiny. (See *People v. Ridens* (1974), 59 Ill. 2d 362.) Obscenity laws are necessarily flexible because

> they are based upon community standards which vary from place to place and may change over time.
>
> Similarly, in civil medical malpractice actions, the testimony of experts is needed to establish the applicable standard of care. Medical standards are not amenable to precise and explicit statutory codification. This court has previously observed that medicine is not an exact science. It is rather a profession which involves the exercise of individual judgment within the framework of established procedures. Differences in opinion are consistent with the exercise of due care. [citation omitted]

Therefore, the legislative use of the term "reasonable medical standards" is sufficient. Common sense must play a role in the construction of statutes." *(Burpo, p. 4)*

JUSTICE FREEMAN, CONCURRING.

While concurring that 720 ILCS 5/12-13 & 720 ILCS 5/12-18 were constitutionally sound, Justice Freeman expressed his view that the Majority had unnecessarily increased the burden on the State beyond what the statute required. Under his view, 720 ILCS 5/12-13 was a general intent crime, and the burden was on defendant to show that he had acted in a manner consistent with reasonable medical standards under 720 ILCS 5/12-18:

> "A prosection of an accused under section 12/13(a)(2) must prove both the accused's intentional act of penetration and knowledge of the victim's inability to give knowing consent. The fact that the prosecution must also prove that the accused know the victim could not consent refutes defendant's agreement that a physician's performance of merely innocent or negligent acts will subject him to prosecution. Intentional conduct alone is not sufficient; and element speaking to unlawful purpose is required under the statute.

But in prosecuting a physician who performs vaginal examinations, this court need not override or ignore these express statutory elements. If a female patient is undergoing a vaginal examination to which she has consented, and the examining physician performs it in a manner which suggests that it is not a legitimate medical examination, she is unable, at that point in time and space, to give any knowing consent. And the examining physician knows she was unable to do so because he did not give her advance warning, or an opportunity to consent, and the deed was swiftly done. Thus, under the express terms of the statute, to prosecute a physician who performed a vaginal examination, and intentional act of sexual penetration is required, as well as indication that the physician knew of the victim's inability to consent....There is no need to deviate from these expressly stated statutory elements by judicially crafting an additional statutory element." *Burpo, p. 6.*

"Thus, the majority's construction unnecessarily increases the burden of proof on the State since it is the State's burden to prove the elements of the crime beyond a reasonable doubt, and it is the defendant's burden to prove his entitlement to a statutory exemption by a preponderance of the evidence. The State is simply not required to negate an exemption. [citation omitted]" *Burpo, p. 8.*

JUSTICE HARRISON, DISSENTING.

Like the trial court, Justice Harrison finds 720 ILCS 5/12-13 & 720 ILCS 5/12-18 void-for-vagueness. First, he observes that criminal liability under the statute turns on the question of "reasonable medical standards."

"Once the medical `legitimacy' becomes the touchstone of a doctor's criminal liability, as the State argues it should be, the questions of whether a doctor's conduct comports with `reasonable medical standards' within the meaning of section 12-18(b) becomes dispositive. In the State's own words,

> 'Evidence of the physician's compliance or noncompliance with reasonable medical standards is the only way in which a fact finder can determine whether the physician's conduct was good faith medical treatment or aggravated criminal sexual assault.'
>
> Sections 12-13(a)(2) and 12-18(b) are thus inextricable under the State's theory. If, under the evidence, an examination or procedure involving sexual penetration is not "consistent with reasonable medical standards" within the meaning of section 12-18(b), it cannot be regarded as "legitimate" and will therefore subject the defendant to conviction for violation of section 12-13(a)(2)." *Burpo, p. 10-11.*

Unlike the Majority, however, Justice Harrison questions whether "reasonable medical standards" is a sufficiently definite standard upon which to base criminal liability.

> "A criminal statute is facially invalid where it vests in the police virtually complete discretion to determine whether the terms of the statute have been satisfied. [citation omitted]...
>
> Here, the statutory language "consistent with reasonable medical standards" is one of those phrases that appears to have a clearly ascertainable meaning, but, in this context, does not....
>
> Performing internal medicine exams on female patients is a procedure subject to many variables. Techniques differ from doctor to doctor and from place to place. Expert testimony adduced in the trial court indicated that there is considerable variation in standards from one community to the next. Depending on the specific problems involved, a gynecologist in Chicago could be judged differently in terms of "reasonable medical standards," from a gynecologist in Hillsboro. In addition, there can be disagreement on

whether a gynecologist acted properly even among experts applying the same standards." *Burpo, p. 12.*

In conclusion, Justice Harrison notes that the statute's vagueness poses a threat to women who wish to exercise their constitutional right to reproductive freedom.

> "Because the statute requires only intent or knowledge and not any purpose of sexual gratification or arousal [citation omitted], and deviation from "reasonable medical standards" in the course of an internal exam could subject an gynecologist to prosecution, even if the deviation was the result of negligence. With respect to this aspect of the practice of gynecology, medical malpractice wold be criminalized. Whether the conduct was motivated by a criminal purpose or not, punishment could result.
>
> The abuses that might follow at the hands of an overzealous prosecutor are manifest. The situation is especially troubling when viewed in the counts of the ongoing controversy over contraception and abortion rights. For a politically sensitive State's Attorney in a "pro-life" community, the threat of prosecution under sections 12-13(a)(2) and 12-18(b) could be a potent weapon in inhibiting the delivery of gynecological services to women who wish to exercise their constitutional right to reproductive freedom. While Dr. Burpo has refrained from charging the State's Attorney with such an improper purpose here, I cannot help but observe that at least some of the charges in this case arose from Dr. Burpo's work at a Planned Parenthood clinic." *Burpo, p. 13-14.*

## REASONS FOR GRANTING THE WRIT

### I. THE ILLINOIS CRIMINAL ASSAULT PROVISION, 720 ILCS 5/12-13 AND ITS EXEMPTION FOR MEDICAL EXAMINATIONS, 720 ILCS 5/12-18(b), IS VOID FOR VAGUENESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

### A. LAW

As a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," See *United States v. Harris, 347 U.S. 612, 617, 98 L Ed 989, 74 S Ct. 808 (1954)*, or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville, 405 U.S. 156, 162, 31 L Ed 2d 110, 92 S Ct 839 (1972)*, is void for vagueness. *Colautti v. Franklin, 439 U.S. 379, 58 L Ed 2d 596, 99 S Ct 675 (1979)*. Although the void-for-vagueness doctrine focuses on both actual notice to citizens and arbitrary enforcement, the Supreme Court has recognized that the more important aspect of the vagueness doctrine

> "`is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimum guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a `standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Smith v. Goguen, 415 U.S. 566, 574-75, 39 L Ed 2d 605, 613, 94 S Ct 1242, 1248.*

A criminal statute that requires scienter "mitigate[s]" the vagueness of its other terms by helping to ensure that the defendant had adequate notice and by guarding against capricious enforcement through the requirement that he actually have

intended the conduct which the statute seeks to guard against. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S Ct 1186, 1193, 72 L Ed 2d 362 (1982); see also Grayned v. City of Rockford, 408 U.S. 104, 111, 114, 92 S Ct 2294, 2300-2302, 33 L Ed 2d 222 (1972).* The absence of such a requirement, on the other hand, enhances the risks of unfair notice and arbitrary enforcement. *See, e.g., Screws v. United States, 325 U.S. 91, 101-102, 65 S Ct 1031, 1035-36, 89 L Ed 1495 (1945) (plurality opinion).*

Thus, the courts may invalidate a criminal statute on its face even when it could conceivably have had some valid application. *See Kolender v. Lawson, 461 U.S. at 359 n.8, 75 L Ed 2d at 910 n.8, 103 S Ct at 1859 n.8 (1983).* In *Colautti v. Franklin, 439 U.S. 379, 58 L Ed 2d 596, 99 S Ct 675 (1975),* the Supreme Court struck down a section of the Pennsylvania Abortion Act which subjected a physician who performed an abortion to criminal liability if he failed to utilize a statutorily prescribed technique when the fetus was "viable" or when there was "sufficient reason to believe that the fetus may be viable." The section at issue required every person who performs or induces an abortion to make a determination, "based on his experience, judgement or professional competence" that the fetus is not viable. Under the statute, if such person determines that the fetus is viable or if "there is sufficient reason to believe that the fetus may be viable", then he must adhere to the prescribed standard of care.

Defendant contended that this provision was unconstitutionally vague because, (1) it failed to inform the physician as to when his duty to the fetus arose, and (2) it did not make the physician's good-faith determination of viability conclusive. Responding to the former allegation, the State argued that "viable" and "may be viable" were analogous terms, as the latter "simply incorporates the acknowledged medical fact that a fetus is `viable' if it has that statistical `chance' of survival." *Colautti, 58 L Ed 2d 596, 607.* Responding to the latter allegation, the

State argued that the standard-of-care provision simply required that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus.

Ruling for the defendant, this Court found that the statute contained a "double ambiguity." *Colautti, 58 L Ed 2d 596, 606.* Rejecting the State's interpretation of "viable" and "may be viable," the Court noted that the syntax "clearly implies that there are two distinct conditions under which the physician must conform to the standard of care." *Colautti, 58 L Ed 2d 596, 607.* The Court added that the State's argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in "violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti, 58 L Ed 2d 596, 607.*

Also ambiguous was the medical judgment to determine whether there was "sufficient reason" to believe that the fetus may be viable. *Colautti, 58 L Ed 2d 596, 606-7.* The Court noted that it was unclear whether the statute imported a purely subjective standard, or mixed subjective and objective standards:

> "In other words, it is ambiguous whether there must be sufficient reason from the perspective of the judgment, skill, and training of the attending physician or sufficient reason from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center." *Colautti, 58 L Ed 2d 596, 607.*

The record in *Colautti* further indicated that different physicians equated viability with different probabilities of survival, and that the choice of an appropriate abortion technique was "a complex

medical judgment about which experts can—and do—disagree." *Colautti, 58 L Ed 2d 596, 612.* In the face of these uncertainties, the Court thought it "not unlikely" that experts would disagree over whether a particular fetus in the second trimester had advanced to the stage of viability. *Colautti, 58 L Ed 2d 596, 609.*

In ruling the Pennsylvania Act's standard-of-care provision and viability-determination unconstitutional, this Court noted that the vagueness of the viability determination requirement was compounded by the fact that the statute subjected the physician to potential criminal liability without regard to fault. *Colautti, 58 L Ed 2d 596, 609.* In the absence of a scienter requirement, the statute was "little more than a trap for those who act in good faith." *Colautti, 58 L Ed 2d 596, 609; see also United States v. Ragen, 314 US 513, 524, 86 L Ed 383, 62 S Ct 374 (1942).* Indeed, the Court has "long recognized" that the constitutionality of a vague statutory standard is "closely related to whether that standard incorporates a requirement of mens rea." *Colautti, 58 L Ed 2d 596, 609.* Finally, this Court noted that the statute's ambiguities, in conjunction with strict criminal liability for an erroneous determination of viability, "could have a profound chilling effect" on the willingness of physicians to perform abortions, thereby impinging upon a woman's right to reproductive freedom. *Colautti, 58 L Ed 2d 596, 610.*

## B. ANALYSIS

Like the provisions of the Pennsylvania Abortion Act at issue in *Colautti*, 720 ILCS 5/12-13 and 720 ILCS 5/12-18(b) are facially invalid under the fifth and fourteenth amendments of the United States Constitution. *Colautti, 58 L Ed 2d 596.* They are invalid because they deny Dr. Burpo due process of law. They deny Dr. Burpo due process of law because, like the provisions in *Colautti*, they condition liability on confusing and ambiguous criteria in the absence of any scienter requirement. Furthermore, they are particularly susceptible to abuse and may, through

overzealous prosection, be used to impermissibly restrict access to gynecological services, thereby imposing a substantial burden on women who wish to exercise their right to reproductive freedom.

At issue in this writ are the Illinois criminal sexual assault provision (720 ILCS 5/12-13) and an exemption to the assault provision for medical examinations (720 ILCS 5/12-18(b)). The former provides that an accused commits criminal sexual assault when he "commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." 720 ILCS 5/12-13. The latter exempts any medical examination procedure which is conducted by a physician or other medical personnel "in a manner consistent with reasonable medical standards." 720 ILCS 5/12-18(b).

Like the provision in *Colautti* requiring physicians to use a prescribed technique where "there is sufficient reason to believe that the fetus is viable," the phrase "consistent with reasonable medical standards" cannot be defined with reasonable exactness. *Colautti, 58 L Ed 2d at 606-9.* Just as experts differed over the choice of an appropriate abortion technique in *Colautti*, record testimony indicates that gynecologists can and do disagree as to what constitutes "reasonable medical standards." *Colautti, 58 L Ed 2d at 607, 613.* In contrast to Dr. Williams' testimony that it was improper for a gynecologist to rub the lips of the labia, Dr. Gast testified that examinations may involve manual exploration of the vulva, the clitoris, or the rectum, in addition to internal vaginal structures. (C 291). Dr. Gast added that the standard of care varied from city to city and that it was "difficult to define them [the standards] sometimes because of differences in localities." (C 293-94).

As in *Colautti*, there is confusion as to whether subjective or objective, statewide or local, criteria apply in determining the standard of care. *Colautti, 58 L Ed 2d at 607.* Inevitably there

will be substantial gaps between medical skills and facilities in Chicago and other, more rural parts of the state. Such variables add to the uncertainty of a standard which, depending as it does on medical judgment, is already by nature more fluid than static. As a result, an Illinois gynecologist's personal and professional reputation lie in constant jeopardy, at the whim of varying medical standards and at the mercy of the local district attorney. But as Mr. Clyde Kuehn noted in Defendant-Appellee's brief to the Illinois supreme court:

> "Due process requires ascertainable standards of guilt. In a field of endeavor labeled an art rather than a science, standards of practice are in constant change. Our forefathers were treated for illness with leeches. Their sons looked back on those blood sucking days with horror and disbelief. Today, the medical use of leeches has been revisited. The point is that today's standard medical practice is tomorrow's quackery and vice versa. Defining the boundaries of criminal conduct by a concept which is in constant change condemns determination of guilt to a case by case ad hoc and subjective basis. Indeed, the State's construct of the issue would appear to suggest that the judicial determination of what constitutes physician criminal sexual assault should evolve into a case by case resolution on an ad hoc basis through the diversity of opinions that could be garnered from the medical profession at the point in time scheduled for trial." (Kuehn, Defendant-Appellee Brief in the Illinois Supreme Court, p. 22)

In a remarkably swift and unreflective ruling on the subject, the Illinois supreme court dismissed Dr. Burpo's claims of ambiguity, merely citing "common sense." *People v. Burpo, No. 76424 at 4 (Ill. Sup. Ct. Feb. 17, 1995).* Given the opportunity to clarify its decision, the court denied Dr. Burpo's Petition for Rehearing to determine whether "reasonable medical standards" implies a statewide standard or a "locality rule," such as is used

in civil medical negligence cases in Illinois. Presumably, the Illinois court rejected meaningful inquiry regarding "reasonable medical standards" in the belief that its finding of a scienter requirement ensured the constitutionality of the provisions.

But the Illinois court's finding of a scienter requirement, although creatively constructed, is unconvincing. In an opinion remarkable for its activism, the Illinois court finds that 720 ILCS 5/12-13 requires that the prosecution must "prove not only the act of sexual penetration but also that the defendant knew that the patient did not consent." *Burpo, p.2.* According to the court, 720 ILCS 5/12-13 also requires that the prosecution "prove that the gynecologist possessed a mental state of intent, knowledge or recklessness." *Burpo, p.3.* Under this view, when a gynecologist intentionally exceeds the scope of reasonable medical standards, the patient's consent is vitiated and the physician may be prosecuted. As to the assignment of burdens, the court concludes that the burden is on the State to establish beyond a reasonable doubt what the medical standards were, that the physician intentionally transgressed those standards, and that the patient did not consent to the transgressions.[1]

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[1]In its eagerness to invest the provisions with some semblance of constitutional authority, the Illinois Court overturns (without comment) its own precedent as to the proper placement of burden of proof for an exemption. In 1993, the Second District Appellate Court reiterated the holding in *People v. Foster* (5 Dist. 1990), 195 Ill.App. 3d 926, 952, 552 N.E.2d 1112, 1132, that under section 12-18 the defendant bears the burden of proving by a preponderance of the evidence that his acts were consistent with reasonable medical standards. " See *People v. Ikpoh* (2 Dist. 1993) 242 Ill.App. 3d 365, 383-84, 609 N.E.2d 1025, 1039. Citing the Illinois supreme court's observation in *People v. Smith* (Ill. 1978), 15 Ill.Dec. 864, 374 N.E.2d 472, 478, the *Foster* court noted that section 12-18 was an exemption to an offense and that it is "generally defendant's burden to prove he is entitled to the exemption." See *Foster*, 609 N.E.2d at 1039; *People v. Smith* (Ill. 1978), 15 Ill.Dec. 864, 374 N.E.2d 472, 478 (burden on defendant to prove by a preponderance of the evidence that exemption applied).

The preceding seems a very fine law, indeed. More the pity the legislature did not think to draft its likeness. Common sense, says the court, must play a role in the construction of a statute. So too, apparently, should your pen and eraser to better effect liberal rewrites. If Dr. Burpo's reading of the statute is, as the majority opinion of the Illinois Court asserts, "flawed" perhaps it is because, following the lead of his prosecutors, Dr. Burpo takes the statute at its word, gives the words their plain meaning, and applies them.

It is instructive to compare the Illinois court's findings to the actual text of the provisions. Nowhere does the statute state that the prosecution must prove that the defendant knew that the patient did not consent. In vain will you find that the state must "prove that the gynecologist possessed a mental state of intent, knowledge or recklessness." In vain will you find that the burden of the State is to establish beyond a reasonable doubt what the medical standards were, that the physician intentionally transgressed those standards, and that the patient did not consent to the transgressions.

720 ILCS 5/12-13 does not define the crime of sexual assault as requiring any specific intent. It merely requires an act of sexual penetration defined as "...any intrusion...of any part of the body of one person...or object into the sex organ or anus of another person...." Every medical procedure or examination implicating entry into the vagina or rectum subjects the physician performing it to criminal sexual assault. It is precisely this "catch-all" element of 720 ILCS 5/12-13 that necessitates the medical exemption under 720 ILCS 5/12-18. Absent such an exemption, all medical examinations requiring penetration of the vagina or rectum would constitute sexual assault.

The Illinois court may find that the provisions contain an element of *mens rea* but when it comes to their actual application the court cannot avoid the wording of the statute which remains

unmoved, like Pericles amidst the plague. The statute imposes criminal liability where the accused "knew the victim was unable to understand the nature of the act or was unable to give knowing consent." It does not require that defendant acted for pleasure or for improper purpose. The question before the jury will be "did the accused know that the victim was unable to understand the nature of the act or was unable to give knowing consent" and the answer to that question will be invariably, "yes." The answer will be "yes" because the jurors will reasonably infer that a gynecologist *always* knows that the patient does not understand the nature of his acts, medically reasonable or otherwise.

In the absence of statutory language, legal precedent or specific facts to support its position, the Illinois supreme court seeks to legitimize its creative effort through a pair of general principles of statutory construction. The court cites the oft-quoted rule that a facial vagueness challenge will normally be upheld only if the statute is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 499, 102 S Ct 1186, 1193, 72 L Ed 2d 362 (1982).* But, as Justice Harrison points out in his dissent, the precision required of a statute is higher where the statute imposes criminal penalties. *Burpo, p. 12.* That consideration has led this Court "to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Kolender 461 U.S. at 359 n.8, 75 L. Ed. 2d at 910 n. 8, S. Ct. at 1859 n.8 (1983).*

The second axiom relied upon by the Illinois court is "the overriding principle of statutory construction that the court should ascertain and give effect the intent of the legislature." "Overriding" is certainly the correct term, as the court gives a detailed explanation of the statute down to the very distribution of burdens without so much as a single cite to the intent of the legislature. No doubt the majority relied on "common sense." In

their brief before the court, the People too paid homage to the intent of the legislature, but allocated the burden regarding reasonable medical standards differently, placing it on defendant. *Appellee's Brief at 23, Burpo, No. 76424, (Ill. Sup. Ct. Feb. 17, 1995).* How very odd. Could it be that the People failed to use common sense?

"Common sense," like "reasonable medical standards," varies in meaning from one person to the next and should not be relied upon to re-draft facially ambiguous statutes. Nor is it prudent or desirable to relieve legislatures of their obligation to draft with a minimum of clarity. After all, ours is, or ought to be, a government of laws, not men.

Credit is due to Justice Freeman for not participating in the excesses of his fellow justices, but his reading of the statute, although restrained, is also flawed. Although his conclusion conflicts with the clear wording of the provision as well as with prior holdings finding that 720 ILCS 5/12-13 required no mental state, *People v. Terrell (Ill. 1989), 132 Ill.2d 178, 547 N.E.2d 145*, Justice Freeman reads 720 ILCS 5/12-13 to include an element of unlawful purpose. In his view, the requirement that the gynecologist know that the patient was incapable of consent will protect the innocent from prosecution. *Burpo, p.6.*

Other objections aside, Justice Freeman's interpretation must fail if only for the reason that it negates 720 ILCS 5/12-18. In other words, if 720 ILCS 5/12-13 requires an unlawful purpose, gynecologists and other medical personnel working in good faith would have no need for the exemption of 720 ILCS 5/12-18. Under this view, no special exemption for medical personnel is required. Justice Freeman's construction of the statute is reminiscent of the reasoning rejected by this Court in *Colautti*, where the State argued that "may be viable" was synonymous with "viable." *Colautti, 58 L Ed 2d at 607.* As Justice Freeman's interpretation makes 720 ILCS 5/12-18(b) redundant, it violates

"the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti, 58 L Ed 2d at 607.*

Whether by intent or oversight, the Illinois legislature did not include a scienter requirement in its sexual assault provision. Absent such a requirement, 720 ILCS 5/12-23, as statutorily exempted under 720 ILCS 5/12-18(b), is void-for-vagueness as applied to gynecologists in general and Dr. Burpo in particular. In *Colautti*, this Court made clear that due process will not admit a statutory scheme in which strict criminal liability is predicated on uncertain and confusing criteria. *Colautti, 58 L Ed 2d 596.* The constitutional defects discussed by this Court with regard to the Pennsylvania Abortion Act in *Colautti* are substantially present in 720 ILCS 5/12-13 and 720 ILCS 5/12-18(b) and mandate a like result.

To cure the constitutional defect, the Illinois legislature need only inject an element of purpose into 720 ILCS 5/12-23. For instance, in *Poole v. Wood (8th Cir. 1995), 45 F.3d 246, 249*, a Minnesota sexual assault statute survived a constitutional challenge on grounds of vagueness in part because it requires that the sexual contact be "committed with sexual or aggressive intent." *Minn.Stat. 609.341, subd. 11 (1990).* Alternatively, the legislature might expand 720 ILCS 5/12-18 to include an exemption for medical personnel acting in good faith.

Finally, as observed by Justice Harrison in his cogent dissent, it is perhaps telling that several of the charges in this case stem from Dr. Burpo's work at a Planned Parenthood clinic. Although bearing somewhat less directly on a woman's right to reproductive freedom than did the statute at issue in *Colautti*, the Illinois sexual assault statute, as currently drafted, is not irrelevant to a woman's constitutional right to choose. *Colautti, 58 L Ed 2d at*

*610.* When viewed in the context of the ongoing controversy over contraception and abortion rights, these provisions become especially troubling. As Justice Harrison notes:

> "For a politically sensitive State's Attorney in a pro-life' community, the threat of prosecution under sections 12-13(a)(2) and 12-18(b) could be a potent weapon in inhibiting the delivery of gynecological services to women who wish to exercise their constitutional right to reproductive freedom."
>
> (*Burpo, p. 13*)

Indeed.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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